

STATE OF FLORIDA

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Commissioners:
JULIA L. JOHNSON, CHAIRMAN
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING



GENERAL COUNSEL
ROBERT D. VANDIVER
(850) 413-6248

Public Service Commission

July 10, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

BY AIRBORNE EXPRESS

Re: CC Docket No. 96-262 and CC Docket No. 94-1/ Access Charge Reform Price Cap
Performance Review for Local Exchange Carriers.

Dear Mr. Caton:

Enclosed please find the original and seventeen copies of Petition of Florida Public Service Commission for Clarification and/or Reconsideration in the above dockets. Please date-stamp one copy and return in the enclosed self-addressed stamped envelope.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cynthia Miller".

Cynthia Miller
Senior Attorney

CBM:jmb
Enclosure

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554**

In the Matter of:)

Access Charge Reform)

Price Cap Performance Review)

for Local Exchange Carriers)

CC DOCKET 96-262

CC DOCKET 94-1

**PETITION OF FLORIDA PUBLIC SERVICE COMMISSION
FOR CLARIFICATION AND/OR RECONSIDERATION**

The Florida Public Service Commission (FPSC) hereby files this Petition for Clarification of the May 7 Federal Communications Commission (FCC) Order in the above dockets. This petition is filed pursuant to Rule 1.429 of the FCC's regulations.

While the FPSC believes that the FCC generally has avoided infringing on state jurisdiction in this Order, there are some paragraphs that we believe should be deleted. These paragraphs are: (1) unnecessary to the access charge rulemaking; (2) relate primarily to a different docket (the universal service docket, CC Docket No. 96-45); and (3) depending on what actions the FCC is contemplating, could be beyond the scope of FCC authority pursuant to the Telecommunications Act of 1996. The FCC has no business, at any point, instituting "a vast-set of wide-ranging pricing rules applicable to interstate and intrastate services."

They are Paragraphs 10, 11, and 381, and are quoted below:

¶ 10 Nor, by our orders today, do we attempt to identify or eliminate the implicit universal service support mechanisms established by state commissions. We recognize that states are responsible for identifying implicit intrastate subsidies. . . . [W]e believe the Commission

has discretion under the statute to employ pro-competitive deregulatory policies to aid in the reform of the existing, complex system of universal service. Where pro-competition policies, such as those set forth in Section 251, 252 and 253, can force prices for telecommunication services to competitive levels, and, as a result, eliminate or, at least, substantially eliminate implicit support, the Act grants us the authority to rely on such policies over a period of time. We find that the Act does not require, nor did Congress intend, that we immediately institute a vast set of wide-ranging pricing rules applicable to interstate and intrastate services provided by incumbent LECs that could have enormously disruptive effects on both ratepayers as well as the affected LECs. . . . Reliance on competition is the keystone that unifies our universal service access reform orders. (Emphasis supplied)

- ¶ 11 Nevertheless, implicit intrastate universal service support is substantial. States have maintained low residential basic service rates through, among other things, a combination of: geographic rate averaging, high rates for business customers, high intrastate access rates, high rates for intrastate toll service, and high rates for vertical features and services such as call waiting and call forwarding. By not mandating immediate Commission action to eliminate these policies and instead by ordering that the Commission and the states together achieve universal service goals, Congress intended that states, acting pursuant to Section 254(f) of the Communications Act, must in the first instance be responsible for identifying intrastate implicit universal service support. Indeed, by our decisions in this Order and in our companion Universal Service Order, we strongly encourage states to take such steps. (Emphasis supplied)
- ¶ 381 In our Universal Service order, we conclude that the Federal mechanisms should support 25% of the difference between forward-looking economic cost of serving the customer and the appropriate revenue benchmark. . . . [W]e direct incumbent LECs to use any universal service support received from the new universal service mechanisms to reduce or satisfy the interstate revenue requirement otherwise collected through interstate access charges.

The FCC jurisdictional viewpoint that it may review intrastate subsidies¹ at some future point is of concern, as is the future potential mandate for LECs to obtain a portion of their Federal universal service support from the states via a Federally-structured program. States have the legal authority and are best-positioned to guide these reviews and determinations. Again, the jurisdictional framework is what concerns us.

The only provisions in the Act cited by the FCC in this Order for this intrastate authority are those listed in ¶ 10 as Sections 251, 252, and 253. However, Section 251 is on Interconnection and most of the FCC's actions in the interconnection area (the Local Competition Docket) have been stayed by the Eighth Circuit. See Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1996). The FCC's interpretation of its jurisdictional authority thus has been questioned at this stage. Section 252 is on Procedures for Negotiation, Arbitration, and

¹ See Competitive Telecommunication Assn. v. FCC, Docket No. 96-3604 (Eighth Circuit Court of Appeals, June 27, 1997). The Court states in footnote 5: While we uphold the FCC's decision to allow incumbent LECs to collect, on an interim basis, access charges for interstate calls, we vacate the Commission's attempt to regulate the temporary recovery of access charges for intrastate calls contained in paragraphs 729 through 732 of the First Report and Order and C.F.R. 51.515(c) (1996) as being beyond the scope of the Commission's jurisdiction. See 47 U.S.C. 152(b) (1994). While we recognize the FCC is merely allowing the state commissions to continue to allow the LECs to collect access charges on intrastate calls, we believe that such an assertion of regulatory power is beyond the scope of the FCC's jurisdiction. Opinion at pg. 19.

Approval of Agreement. That section is generally one that authorizes state commissions to take actions upon the failure of private parties to negotiate. Only Section 253 on Removal of Barriers to Entry gives the FCC an authorizing statute to address. Yet that statutory section envisions only a case-by-base approach rather than a generic preemptive approach by the FCC. It provides, in Section 253(a), that "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." However, in Section 253(b), on State Regulatory Authority, the Act provides:

Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, and ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Section 253(d) sets forth the FCC's preemption authority:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

This preemption authority is not something that can be generically issued prior to an identification of a specific

statute, regulation or legal requirement that offends. That scenario is not present here.

In addition, the Telecommunications Act refers in Section 254(b)(5) to an independent state mechanism to preserve and advance universal service.

Last, but not least, Section 2(b) was retained in the Telecommunications Act of 1996. It provides in 47 U.S.C. 152(b):

Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier.

The Court in the recent Eighth Circuit case, Competitive Telecommunications Assn. v. FCC, Docket No. 96-3604 (Eighth Circuit Court of Appeals, June 27, 1997) gave great and continuing importance to Section 2(b).

Thus, it is mystifying why the FCC, at the very time it is urging a Federal-State partnership and cooperation, would now place these unnecessary and jurisdictionally aggressive paragraphs in its Order. Except for Section 253 authority to review state laws and regulations on a case-by-case basis to identify barriers to entry, the FCC has no authority to look at intrastate subsidies or require LECs to seek recovery of their dollars for a Federally-dictated program through the states.²

² See Printz v. U.S., Docket Nos. 95-1478 and 95-1503 (U.S. 1997), in which the Court held that the U.S. Government

This framework in the Order should be deleted. We urge that, in the spirit of comity and cooperation, you delete these paragraphs from the Order.

Respectfully submitted,


CYNTHIA B. MILLER
Senior Attorney

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(904) 413-6082


provisions "commanding state and local law enforcement officers to conduct background checks on prospective handgun purchases" violate the Constitution. The Court stated that "the Federal Government may neither issue directives requiring the states to address particular problems, nor command the states' officers, or those of their political subdivisions to administer or enforce a federal regulatory program." Opinion at pg. 37.

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WASHINGTON D.C. 20554

In the Matter of:)	
)	
Access Charge Reform)	CC DOCKET 96-262
Price Cap Performance Review)	CC DOCKET 94-1
for Local Exchange Carriers)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition of Florida Public Service Commission for Clarification and/or Reconsideration has been furnished to all parties listed on the attached list this 10th day of July, 1997.



CYNTHIA B. MILLER
Senior Attorney

William E. Kennard, General Counsel
Federal Communications Commission
1919 M Street, NW, Room 614
Washington, DC 20554

Nancy C. Garrison
Catherine O'Sullivan
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-001

Thomas F. O'Neil, III
William Single, IV
MCI Telecommunications Corporation
1133 Nineteenth Street, NW
Washington, DC 20036

Donald B. Verrilli, Jr.
Jenner & Block
601 Thirteenth Street, NW
Washington, DC 20005

Federal Communications Commission
Competitive Pricing Division (2 CYS)
Common Carrier Bureau
1919 M Street, NW, Room 518
Washington, DC 20554

International Transcription Service
1919 M Street, NW, Room 640
Washington, DC 20036

Georgia Public Service Commission
Utilities Division
244 Washington Street, SW, Suite 266
Atlanta, Georgia 30334-5701
ATTN: Mr. B. B. Knowles, Director

Lyman C. Welch
190 S. LaSalle Street
#3100
Chicago, Illinois 60603

Public Utility Commission of Oregon
550 Capitol Street, NE
Salem, Oregon 97310-1380

Public Utility Commission of Texas
Post Office Box 13326
Austin, Texas 78711-3326

Kenneth T. Burchett
GVNW Inc./Management
7125 SW Hampton
Portland, Oregon 97223

Scott J. Rubin, Esquire
Pennsylvania Internet Service
Providers
3 Lost Creek Drive
Selinsgrove, Pennsylvania 17870

Lawrence D. Crocker, III
Public Service Commission of the
District of Columbia
717 14th Street, NW
Washington, DC 20005

Steven G. Sanders - President
Northern Arkansas Telephone
Company, Inc.
301 East Main Street
Flippin, Arkansas 72634

Carol C. Henderson, Exec. Director
American Library Association
ALA Washington Office
1301 Pennsylvania Avenue, NW
Suite 403
Washington, DC 20004

Edward Hayes, Jr., Esquire
1155 Connecticut Avenue, NW
Third Floor
Washington, DC 20036

Curtis T. White
Geld Information Systems
4201 Connecticut Avenue, NW, #402
Washington, DC 20008-1158

Ronald Dunn, President
Information Industry Association
1625 Massachusetts Avenue, NW
Suite 700
Washington, DC 20036

Daniel Weitzner
Alan B. Davidson
Center for Democracy & Technology
1634 Eye Street, NW, Suite 1100
Washington, DC 20006

Joseph S. Paykel
Andrew Jay Schwartzman
Media Access Project
1707 L Street, NW, Suite 400
Washington, DC 20036

Gary M. Epstein
James H. Barker
Latham & Watkins
1001 Pennsylvania Avenue NW #1300
Washington, DC 20004-2505

Richard M. Tettelbaum
Citizens Utilities Company
1400 16th Street, NW, #500
Washington, DC 20036

Jack Krumholtz
Law & Corporate Affairs Department
Microsoft Corporation, Suite 600
5335 Wisconsin Avenue, NW
Washington, DC 20015

Danniel L. Brenner
David L. Nicoll
National Cable Television
Association, Inc.
1724 Massachusetts Avenue, NW
Washington, DC 20036

Thomas K. Crowe
Michael B. Adams
David H. Schwartz
Law Offices of Thomas K. Crowe, PC
2300 M Street, NW, Suite 800
Washington, DC 20037

Rachel J. Rothstein
Cable & Wireless, Inc.
8219 Leesburg Pike
Vienna, Virginia 22182

Timothy R. Graham
Robert G. Berger
Joseph Sandri
Winstar Communications, Inc.
1146 19th Street, NW
Washington, DC 20036

Dana Frix
Mark Sievers
Swidler & Berlin, Chtd.
3000 K Street NW, Suite 300
Washington, DC 20007

William W. Burrington
Jill Lesser
America Online, Inc.
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Donna N. Lampert
James A. Kirkland
Jennifer A. Purvis
Mintz Levin Cohn Ferris Glovsky
and Popeo, PC
701 Pennsylvania Avenue, NW, #900
Washington, DC 20004

Michael J. Shortley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, New York 14646

Michael S. Fox
John Staurulakis, Inc.
6315 Seabrook Road
Seabrook, Maryland 20706

Robert S. Tongren
Ohio Consumers' Counsel
77 South High Street, 15th Floor
Columbus, Ohio 43266-0550

Joanne Salvatore Bochis
Perry S. Goldschein
National Exchange Carrier Assoc.
100 South Jefferson Road
Whippany, New Jersey 07981

Ozarks Technical Community College
Post Office Box 5958
Springfield, Missouri 65801

SDN Users Association, Inc.
Post Office Box 4014
Bridgewater, New Jersey 08807

Charles D. Gray
James Bradford Ramsay
National Association of Regulatory
Utility Commissioners
1100 Pennsylvania Avenue, Suite 603
Washington, DC 20004

Michael S. Pabian
Larry A. Peck
Ameritech
2000 West Ameritech Center Drive
Room 4H82
Hoffman Estates, Illinois 60196-1025

F. Stephen Lamb
TCA, Inc.
3617 Betty Drive, Suite 1
Colorado Spgs., Colorado 80917-5909

Scott L. Smith, Vice President
Alaska Telephone Association
4341 B Street, Suite 304
Anchorage, Alaska 99503

Wayne Leighton
Citizens for a Sound-Economy
Foundation
1250 H Street, NW, Suite 700
Washington, DC 20005

Betty D. Montgomery
Steven T. Nourse
Attorney General of Ohio
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215-3793

Cindy Z. Schonhaut
ICG Telecom Group, Inc.
9605 East Maroon Circle
Englewood, Colorado 80112

Ronald J. Binz
Debra R. Berlyn
John Windhausen, Jr.
Competition Policy Institute
1156 15th Street, NW, Suite 310
Washington, DC 20005

Albert H. Kramer
Dickstein Shapiro Morin &
Oshinsky, LLP
2101 L Street, NW
Washington, DC 20037-1526

Kathy L. Shobert
General Communication, Inc.
901 15th Street, NW, Suite 900
Washington, DC 20005

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
Sprint Corporation
1850 M Street, NW, 11th Floor
Washington, DC 20036

Catherine R. Sloan
WorldCom, Inc.
1120 Connecticut Avenue, NW
Washington, DC 20036-3902

Richard J. Heitmann
WorldCom, Inc.
515 East Amite
Jackson, Mississippi 39201-2702

Alex J. Harris
WorldCom, Inc.
33 Whitehall Street, 15th Floor
New York, New York 10004

Peter A. Rohrbach
David L. Sieradzki
F. William Lebeau
Hogan & Hartson, LLP
555 13th Street, NW
Washington, DC 20004-1109

Wayne V. Black
C. Douglas Jarrett
Keller & Heckman, LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001

Coleen Boothby/James S. Blaszk
Kevin S. Dilallo/Sasha Field
Levine Blaszk Block & Boothby
1300 Connecticut Avenue, NW
Suite 500
Washington, DC 20036

Genevieve Morelli
Competitive Telecommunications
Association
1900 M Street, NW, Suite 800
Washington, DC 20036

Charles C. Hunter
Catherine M. Hannan
Hunter & Mow, PC
1620 I Street, NW, Suite 701
Washington, DC 20006

Edward Shakin
Bell Atlantic Telephone Co.
1320 North Court House Road
8th Floor
Arlington, Virginia 22201

Joseph Dibella
Nynex Telephone Companies
1300 I Street, NW
Suite 400 West
Washington, DC 20005

Mary McDermott/Linda Kent
Keith Townsend/Hance Haney
United States Telephone Assoc.
1401 H Street, NW, Suite 600
Washington, DC 20005

Fleishman & Walsh, LLP
1400 Sixteenth Street, NW
Washington, DC 20036

Gary L. Mann
IXC Long Distance, Inc.
98 San Jacinto, Suite 700
Austin, Texas 78701

Mark C. Rosenblum/Peter H. Jacoby
Judy Sello
AT&T Corporation
295 North Maple Avenue
Room 3245G1
Basking Ridge, New Jersey 07920

Gene C. Schaerr
David L. Lawson
Scott M. Bohannon
AT&T Corporation
1722 Eye Street, NW
Washington, DC 20006

Robert M. McDowell
Brian A. Cute
Helein & Associates, PC
8180 Greensboro Drive, Suite 700
McLean, Virginia 22102

Anne U. MacClintock
The Southern New England
Telephone Company
227 Church Street
New Haven, Connecticut 06510

Thomas E. Taylor
Christopher J. Wilson
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202

Robert B. McKenna
Richard A. Karre
Coleen M. Egan Helmreich
U S West, Inc.
1020 19th Street, NW, Suite 700
Washington, DC 20036

Joe D. Edge
Tina M. Pidgeon
Drinker Biddle & Reath
901 15th Street, NW, Suite 900
Washington, DC 20005

Marlin D. Ard
Nancy C. Woolf
Pacific Telesis Group
140 New Montgomery Street
San Francisco, California 94105

Margaret E. Garber
Pacific Telesis Group
1275 Pennsylvania Avenue, NW
Washington, DC 20004

Emily C. Hewitt
GSA
18th & F Streets, NW, Room 4002
Washington, DC 20405

Office of the Judge Advocate General
U.S. Army Litigation Center
901 North Stuart Street, Suite 713
Arlington, Virginia 22202-1837

John Rother, Esquire
American Association of Retired
Persons
601 E Street, NW
Washington, DC 20049

Mary Rouleau, Esquire
Dr. Mark N. Cooper
Consumer Federation of America
1424 16th Street NW, Suite 604
Washington, DC 20036

Mary Rouleau, Esquire
Dr. Mark N. Cooper
Consumers Union
1666 Connecticut Avenue, NW
Washington, DC 20036

James Love
Consumer Project on Technology
Post Office Box 19367
Washington, DC 20036

Brian R. Moir
Moir & Hardman
2000 L Street NW, Suite 512
Washington, DC 20036-4907

Dr. Barbara O'Connor
Gerald Depo
Alliance for Public Technology
901 15th Street, NW
Washington, DC 20005

David J. Newburger
Newburger & Vossmeier
One Metropolitan Square, Suite 2400
St. Louis, Missouri 63102

Martha S. Hogerty
Office of the Public Counsel
Post Office Box 7800
Jefferson City, Missouri 65102

Jack Shreve
Office of Public Counsel
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400

Mike Travieso
Office of People's Counsel
6th St. Paul Street, Suite 2102
Baltimore, Maryland 21202

Irwin A. Popowsky
Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, Pennsylvania 17120

James Maret
Office of Consumer Advocate
Lucas State Office Building
4th Floor
Des Moines, Iowa 50319

Elizabeth A. Noel
Office of the People's Counsel
1133 15th Street, NW Suite 500
Washington, DC 20005

Rob Manifold
Assistant Attorney General
900 4th Avenue, Suite 2000
Seattle, Washington 98164

Regina Costa
Toward Utility Rate Normalization
625 Polk Street, Suite 403
San Francisco, California 94102

Eric Swanson
Office of Attorney General
445 Minnesota Street
Suite 1200 WCL Tower
St. Paul, Minnesota 55101-2130

Anne Becker
Office of Utility Consumer
Counselor
100 North Senate Avenue, Rm. N501
Indianapolis, Indiana 46204-2208

Peter Arth, Jr./Lionel B. Wilson
Mary Mack Adu/Helen M. Mickiewicz
California PUC
505 Van Ness Avenue
San Francisco, California 94102

Mary Newmeyer
Alabama Public Service Commission
Post Office Box 991
Montgomery, Alabama 36101

Maureen O. Helmer
New York State Department of
Public Service
Three Empire State Plaza
Albany, New York 12223-1350

Laurie Pappas
Office of Public Utility Counsel
1701 N. Congress Avenue, 9-180
Post Office Box 12397
Austin, Texas 78711-2397

James A. Burg
Pam Nelson
South Dakota Public Utilities
Commission
State Capitol
Pierre, South Dakota 57501-5070

R. Michael Senkowski
Jeffrey S. Linder
Gregory J. Vogt
Wiley Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Ward W. Wueste
Gail L. Polivy
GTE Service Corporation
1850 M Street, NW
Suite 1200
Washington, DC 20036

Richard Hemstad
William R. Gillis
Washington Utilities &
Transportation Commission
1300 S. Evergreen Park Drive
Olympia, Washington 98504-7250

Michael T. Skrivan
Harris Skrivan & Associates LLC
8801 South Yale, Suite 220
Tulsa, Oklahoma 74137

Kathleen Q. Abernathy
David A. Gross
Airtouch Communications, Inc.
1818 N Street, NW
Washington, DC 20036

Pamela J. Riley
Airtouch Communications, Inc.
One California Street, 9th Floor
San Francisco, California 94111

Mark J. Golden
Robert L. Hoggarth
Nary Madigan
Personal Communications Industry
Association
500 Montgomery Street, Suite 700
Alexandria, Virginia 22214-1561

Christopher W. Savage
Cole Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Richard J. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
1200 19th Street, NW, Suite 560
Washington, DC 20036

Teresa Marrero
Teleport Communications Group, Inc.
Two Teleport Drive
Staten Island, New York 10311

Glenn B. Manishin
Christine A. Mailloux
Blumenfeld & Cohen - Technology
Law Group
1615 M Street, NW, Suite 700
Washington, DC 20036

Brian Conboy/Thomas Jones
Gunnar Halley
Willkie Farr & Gallagher
Three Lafayette Center
1155 21st Street NW
Washington, DC 20036

Randall B. Lowe
Piper & Marbury, LLP
1200 19th Street, NW
Washington, DC 20036

John J. List
Rural Telephone Finance Cooperative
2201 Cooperative Way
Herndon, Virginia 20171

Benjamin H. Dickens, Jr.
Gerard J. Duffy
Blooston Mordkofsky Jackson &
Dickens
2120 L Street NW, Suite 300
Washington, DC 20037

David A. Irwin
Tara S. Becht
Irwin Campbell & Tannenwald, PC
1739 Rhode Island Avenue, NW
Suite 200
Washington, DC 20036-3101

Diane Smith
Carolyn C. Hill
Alltel Corporate Services, Inc.
655 15th Street NW
Suite 220
Washington, DC 20005-5701

Kent Larsen
Cathey Hutton & Associates
2711 LBJ Freeway, Suite 560
Dallas, Texas 75234

Clint Frederick
Frederick & Warinner, LLC
10901 West 84th Terrance, Suite 101
Lenexa, Kansas 66214-1631

George Petrutsas
Paul J. Feldman
Fletcher Heald & Hildreth, PLC
1300 North 17th Street, 11th Floor
Rosslyn, Virginia 22209

Richard J. Johnson
Michael J. Bradley
Moss & Barnett
4800 Norwest Center
90 South 7th Street
Minneapolis, Minnesota 55402-4129

David Cosson
L. Marie Guillory
NTCA
2626 Pennsylvania Avenue, NW
Washington, DC 20037

Lisa M. Zaina
Kenneth Johnson
Opastco
21 Dupont Circle, NW, Suite 700
Washington, DC 20036

Jeffrey F. Beck
Jillisa Bonfman
Beck & Ackerman
Four Embarcadaro Center, Suite 760
San Francisco, California 94111

Robert A. Mazer
Albert Shuldiner
Vinson & Elkins
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1008

Randolph J. May
Bonding Yee
Sutherland Asbill & Brennan
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2404

Stephen G. Kraskin
Sylvia Lesse
Thomas J. Moorman
Kraskin & Lesse
2120 L Street NW, Suite 530
Washington, DC 20037

Edwin N. Lavergne
J. Thomas Nolan
Ginsburg Feldman & Bress, Chtd.
1250 Connecticut Avenue, NW
Washington, DC 20036

Jack Krumholtz
Microsoft Corporation
5335 Wisconsin Avenue, NW
Suite 600
Washington, DC 20015

Stanley M. Gorinson
William H. Davenport
Preston Gates Ellis & Rouvelas Meeds
1735 New York Avenue, NW
Washington, DC 20006

Robert D. Collet/Barbara A. Dooley
Ronald L. Plessner/Mark J. O'Connor
James J. Halpert
Piper & Marbury, LLP
1200 19th Street, NW
Suite 700
Washington, DC 20036

Henry D. Levine
Laura F.H. McDonald
Levine Blaszk Block & Boothby
1300 Connecticut Avenue, NW
Suite 500
Washington, DC 20036

Gregory M. Casey
Douglas W. Kinkoph
LCI International Corp., Inc.
8180 Greensboro Drive, Suite 800
McLean, Virginia 22102

Terry Michael Banks
ICG Telecom Group
1303 Sawbridge Way
Reston, Virginia 22094

Christopher Klein
Tennessee Regulatory Authority Staff
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

David S.J. Brown
E. Molley Leahy
Newspaper Association of America
529 14th Street, NW
Suite 440
Washington, DC 20045

Lesla Lehtonen
California Cable Television Assoc.
4341 Piedmont Avenue
Oakland, California 94611

James Brennan
NYSERNET, Inc.
Rensselaer Technology Park
Troy, New York 12180-7698

W. Fred Seigneur
Sonetech, Inc.
109 Kale Avenue
Sterling, Virginia 20164

David J. Newburger
Newburger & Vossmeier
One Metropolitan Square
Suite 2400
St. Louis, Missouri 63102

Messrs. C. Sloan, D. Porter,
R. Fruchterman & R. Whitt
WorldCom, Inc.
1120 Connecticut Avenue, NW
Washington, DC 20036-3902

Alex J. Harris
WorldCom, Inc.
33 Whitehall Street
15th Floor
New York, New York 10004

Messrs. Rohrbach, Steradzki & LeBeau
Hogan & Hartson, LLP
555 13th Street, NW
Washington, DC 20004-1109

Laurie Pappas
Texas Office of Public Utility
Counsel
Post Office Box 12397
Austin, Texas 78711-2397

Morton Bahr
Communications Workers of America
501 Third Street, NW
Washington, DC 20001

Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, Kansas 66604-4027

Federal Communications Commission
Industry Analysis Division
Common Carrier Bureau Room 534
1919 M Street, NW
Washington, DC 20554

James Schlichting
Federal Communications Commission
1919 M Street NW, Room 518
Washington, DC 20554

John C. Smith
Aeronautical Radio, Inc.
2551 Riva Road
Annapolis, Maryland 21401

Messrs. Pierson, Metzger & Minster
Pierson & Tuttle
1200 19th Street, NW, Suite 607
Washington, DC 20036

M. Robert Sutherland
BellSouth Telecommunications, Inc.
Suite 1700
1155 Peachtree Street, NW
Atlanta, Georgia 30309-3610

Messrs. Lampert, Harvie & Valentino
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, PC
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Walter G. Bolter, PhD.
Bethesda Research Institute, Ltd.
Post Office Box 4044
St. Augustine, Mflorida 32085

Allan J. Arlow
Computer & Communications Industry
Association
666 11th Street, NW
Washington, DC 20001

Charles A. Zielinski
Rogers & Wells
607 14th Street, NW
Washington, DC 20005

Henry Mrivera
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Avenue, NW
Washington, DC 20036

James E. Keith
Ambox Incorporated
6040 Telephone Road
Houston, Texas 77087

Barry Gorsun
Summa Four, Inc.
25 Sun Dial Avenue
Manchester, New Hampshire 03103

Charles W. Trippe
Ampro Corporation
525 John Rodes Boulevard
Melbourne, Florida 32934

Joseph A. Lahoud
LC Technologies, Inc.
9455 Silver King Court
Fairfax, Virginia 22031

Paul Pandian
Axes Technologies, Inc.
3333 Earhart
Carrollton, Texas 32230

Fred Van Veen
Teradyne, Inc.
321 Harrison Avenue
Boston, Massachusetts 02118

James B. Wood
Inovonics, Inc.
1304 Sair Avenue
Santa Cruz, California 95060

Frank Tripi
Perception Technology Corporation
40 Shownut Road
Canton, Maryland 02021

L. Paul Knoerzer
OK Champion Corporation
Post Office Box 585
Hammon, Indiana 46320

John E. Lingo, Jr.
Lingo, Inc.
Post Office Box 1237
Camden, New Jersey 08105

William H. Combs, III
Tamaqua Cable Products Corporation
300 Willow Street
Schuylkill Haven, Pennsylvania 17972

J. R. Panholzer
Remarque Mfg. Corporation
110 Field Street
W. Babylon, New York 11704

Al W. Wokas
Rhetorex, Inc.
200 East Hacienda Avenue
Campbell, California 95008

George Sollman
Centigram Communications Corp.
91 East Tazman Drive
San Jose, California 95134

Stephen B. Kaufman
Healthtech Services Corporation
255 Revere Drive, Suite 101
Northbrook, Illinois 60062

David L. Deming
Senecom Voice Processing Systems
6 Blossomwood Court
St. Louis, Missouri 63033-5202

Lucile M. Moore
Intelect, Inc.
1100 Executive Drive
Richardson, Texas 75081

Tenley A. Carp
Government Services Administration
18th and F Streets, NW
Room 40002
Washington, DC 20405

Emily C. Hewitt
Government Services Administration
18th and F Streets, NW
Room 40002
Washington, DC 20405

Vincent L. Crivella
Michael J. Ettner
GSA, Personal Property Division
18th and F Street, NW
Room 40002
Washington, DC 20405

Richard McKenna
HQE03J36
GTE Service Corporation
Post Office Box 152092
Irving, Texas 75015-2092